

TOWN OF DERRY
ZONING BOARD OF ADJUSTMENT MINUTES
April 6, 2017

Members Present

Lynn Perkins, Chairman
Heather Evans, Secretary
Stephen Coppolo
Randall Kelley

Members Absent

Joseph Carnevale

Alternates Present

Donald Burgess

Alternates Absent

Code Enforcement

Robert Mackey

Mr. Perkins called the meeting to order at 7:12 p.m. with the salute to the flag, and notice of fire and handicap exits and that this and all Zoning Board meetings are videotaped.

The Board introduced themselves for the record.

Mr. Perkins said that due to the absence of one of the Board's full members tonight's election of officers would be postponed to the next regular scheduled meeting.

Mr. Perkins asked if anyone was present for the Perfetto case as tonight's hearing has a potential to be a long meeting and that the Board only meets until 10:00 pm and if they wish they could be postponed to the next meeting or stay and take their chances that their case would be heard this evening. Mrs. Perfetto said that she would stay and take the chances.

It was noted for the record that Mr. Burgess would sit for the following case.

Mr. Perkins said that following case is a re-hearing and the Attorneys were asked to present information as there were some questions from the Board with regard to clarity. He asked if Attorney Serge would present his information for the record and that the Board would then ask questions and there would be allowances for rebuttal from Attorney Campbell.

Rehearing of case #17-104 - Robert Allen, By his attorneys Beaumont & Campbell, PA - Variance to the terms of Article VI, Section 165-48.A of the Town of Derry Zoning Ordinance to construct a self-storage facility consisting of 138 units in four (4) buildings with an office structure for an on-site manager at the property. Parcel ID 17002, 343 Island Pond Road Zoned LDR.

Attorney Matthew Serge, representing Town Council, said that he was here with regard to the recent variance granted to the applicant for 4 buildings consisting of 138 storage units. Attorney Serge said that the request is for a variance for the use of which is not allowed in the LDR zoning district. He said that the burden of proof is that the applicant has to convince the Board that there are no other reasonable uses that can be utilized on the property. He said that he feels that the request is directly contrary to the public interest and spirit and intent of the ordinance.

Attorney Serge reviewed his submission for the record.

Attorney Serge asked if the Board performed site walks. Mr. Perkins said that the Zoning Board does not perform site walks and that it is more of a Planning Board item.

Board Questions

Mr. Coppolo asked if finding of the Board if not receive finding of Real Estate Board can feel as Board infringed on property value. Attorney Serge said that is why he asked if the Board did site walks.

Mr. Coppolo asked if it was his position was that the Board could not legally find that neighboring property values would not be affected without written evidence from an appraiser or realtor. He asked whether the Board could use its common sense in finding no impairment of surrounding real estate values. Attorney Serge said that he was going on the basis of what the applicant was producing as evidence. Attorney Serge said no but he has seen a simple cover letter consisting of a paragraph or two stating the findings. It would not require a full scale appraisal.

Attorney Serge said that he did not feel anything presented addressed the concerns of the abutters. Attorney Serge addressed some of areas of concerns as follows:

- * Substantial justice - where was the balance as loss to the applicant in not receiving approval. Attorney Serge said that the area is a 3 acre minimum for a parcel and a choice to build a home and that people can ask for a change. They could ask for 1 or 1.5 acre parcels which might be where the applicant needs to go with this.
- * Financial loss – no data as to what loss the applicant would occur. Attorney Serge said that he feels there are other options available. Denial of request would preserve the use of character of the neighborhood and that the nearby residents would be protected. There is nothing unique about the property as it is 3 acres, applicant stated use would have to be an estate style home or farm. He

said that there are viable uses and not every 3 acre parcel will have estate style homes.

Attorney Serge reviewed the map submitted by Attorney Campbell of the area for the record.

There was some discussion with regard to statute and standing of filing for a rehearing request.

Mrs. Evans asked when the 3 acre zoning change made. Mr. Mackey said that changes to the zoning ordinance starts with the Planning Board then goes to Town Council for public hearings. He said that the zoning changed in 1987 and explained the MDR district.

Mr. Burgess asked what was the reasoning for 3 acre zoning. Attorney Serge said feel that the acreage thinking was for density and land use.

Mr. Perkins said that the 3 acre zoning was to reduce housing development and impact on community as to deter residential growth and impact on schools.

Mr. Coppolo asked what year did the applicant purchase the property. Attorney Serge said that he was unsure.

Mr. Coppolo said that in the original hearing he had voted in favor of the request due to special circumstances. He said that the request was to be located on a heavily traveled road and next door to an auto business of which the person resides there but it was not what he felt a home business would look like and also based on the history of the property. Mr. Coppolo said that he felt that the use would be a better fit due to the chemicals leaking into ground would not be an attractive site to build a home so based on those items he felt it met the criteria.

Attorney Serge said that the property fronts on Island Pond Road and that the applicant could put in a long driveway for a residential home. He said that as far as the auto business located next door there is not anything else that the applicants request could be compared to and adding a storage facility to the area what would be next. Attorney Serge said with regard to hazardous substances and environmental issues that the applicant knew when purchased the property and that is what title insurance is for and that it is the applicant's burden to show hardship.

Mr. Perkins asked when did the property fall under a cleanup with the State. Mr. Mackey said that the property started with unregistered motor vehicles and the Town started an injunction to bring the property into compliance and somewhere along the way the State became involved with a cleanup with the former owner and that as far as his knowledge no test wells have been installed.

Mr. Perkins said there was difficulty found not geographically but unique to the lot itself and that the applicant cleaned up and invested a lot of money to take care of where the Town didn't and asked why that wasn't a hardship. Attorney Serge said that it was not

reasons to be granted a variance. He said just because an applicant incurs expenses to remediate a property is not a factor as can make the property ready for some other use as financial outlet is not reasons for granting a variance.

There was some discussion with regards to the prior use of the property.

Mr. Perkins said that he has resided in Derry since 1963 and that he did not walk the site but does know what the site looked like before and during cleanup. He said that he knows the community and Town Council.

Mr. Kelley said that the request was brought here by Town Council due to the people's concerns and he has not heard of how the request will not impact the residents and asked if it was felt that it would impact the residents. Attorney Serge said that it would impact the residents.

Mr. Burgess said that he reviewed the spirit and intent of the ordinance with relation to public interest and he did not see where it would affect the property values in the area. He said that the property in the 1960's was a trucking operation which operated until approximately 2005 and that the variance was not removed. The current owner purchased the property and was required to mitigate the property. Mr. Burgess said that he felt that the property was not out of commercial use as it still operating bulldozers and crushed stone and selling loam from what he could see from the road when he drove by. He said that he does not see where the ordinance says you can take back a commercial property where it was commercial for over 50 years. The Town will receive tax dollars if the owner builds the storage facility verses a 3-4 bedroom home where it would impact the schools. He said that he does not feel it would be against the character of the neighborhood where there is a repair garage next door, a gas station on route 111 a recycling yard down the road and several other businesses along route 111.

Attorney Serge said that one commercial use does not define use of area. With regard to the second statement by Mr. Burgess with regard to the tax money generated, it is not variance material and kids in school are not a factor. As for density issues not being as intense as a gas station on Route 111, he feels that it is a creep issue and eventually if allowed it would swallow up the area. Attorney Serge said that this project is not right for the site and should be denied.

Mr. Perkins said that the project is 18,000 square feet and that the Board reviewed the application and made conditions to the Planning Board with regard to hours of operation and lighting reduction. Attorney Serge said that the Planning Board review would have criteria on hours of operation, lighting, etc. He said that is within the appeal rights of the Town to request a denial of a variance. Attorney Serge said that in viewing the applicants criteria request they do not meet the hardship criteria and the applicant needs to meet all factors of the criteria in order to be granted a variance.

Mr. Kelley asked Mr. Mackey if a use is not utilized for 1 year or more if it was void. Mr. Mackey said the lot was a non-conforming use and that there is equipment presently on the lot as they are utilizing the lot momentarily to access the rear property.

Mr. Perkins said that the property was currently selling loam. Mr. Mackey said that the back area. He said that the loam typically used as incidental material and sold periodically but they were not triggering any earth removal concerns.

Attorney Serge asked how large were the lots located to the rear. Mr. Mackey said that subdivision behind the property was approved as 3 acre lots.

Mr. Perkins said that the property is known as BR-10 and is a corridor off Bartlett Road and that Island Pond Road is a different corridor.

The Board took a brief recess and reconvened at 8:35pm

Attorney Campbell said that he first wanted to address the change in the Board membership as a concern as the Derry Town Council has made changes to the Board since their first hearing.

Mr. Coppolo said that it was a position of legal right to appoint members. Attorney Campbell said that he feels that they should have deferred appointments until after the appeal was heard.

Attorney Campbell said that he has reviewed the information submitted by Attorney Serge. Attorney Campbell addressed the following:

- * Submitted to the Board material from prior hearing with regard to plan outlying proposed use.
- * Photographs from engineer and history of the property with past history use of the property and showing abutting businesses.
- * Agree a site visit is worth a thousand pictures.
- * Believe that the Board thought properly during its decision of granting the variance and feel that the rehearing request has shown no new evidence of reason for denial.
- * Spirit and intent – reviewed Supreme Court ruling of Harborside verses Portsmouth for the record.
- * Did not hear any address to threat of health/safety and welfare except for traffic and he has submitted a traffic count study for the Board's review. Feel that proposal will not render any threat to the health/safety and welfare of the area.

Attorney Campbell reviewed a memo submitted on March 27, 2017 for the record. He said that he feels that the request has met the conditions required for a variance and do not believe that would be changing the essential character of the neighborhood. Attorney Campbell said that he felt that the Board found favorable in first ruling and that the Board heard the facts and findings were correct.

Mr. Perkins said that earlier there was some discussion with questions of geographic hardship and if there were any areas where the Supreme Courts speaks to that area.

Attorney Campbell said there was talk about manufactured housing park language of substantial justice. He said that there was some talk of stigma issue and that he feels that the lot render is unique and not a test as test is reasonable use of the property. The question of can it be used for 3 acre site as other areas. Attorney Campbell said that Hampshire Drive is a 1 acre lot subdivision with a cul-de-sac, Cella Drive is a 3 acre lot subdivision which has a cul-de-sac, rear property site is 3 acre lots with a cul-de-sac and that this lot feel has no reasonable use for a 3 acre lot where 5,000 plus cars go by daily. He said he felt that this is an ancillary use and is not a gas station or McDonalds where traffic is constant.

Mr. Perkins said that it was of Attorney Serge's opinion that the side and use of the lot was excessive. Attorney Campbell said that the proposed plan shows what will be submitted to Planning Board outlining the buffers around the site, lot coverage, there are no parking requirements but proposal shows 5 parking spaces and other areas for long term parking for boats etc. He said that this is a low profile use and not essentially impact the neighborhood.

Mr. Kelley asked if there was any documentation of contamination of the property presently. Attorney Campbell said that he was unaware of any presently but lack of documentation does not mean that not there.

There was some discussion with regard to non-conforming lots and traffic.

Attorney Campbell said that Attorney Serge implied that self-created hardship and that the courts ruled in Hill verses Chester the fact that someone comes along and requests a use variance does not bar someone from making a request. He reviewed ruling for the record. Attorney Campbell said that just because purchased the lot does not prevent use request.

Attorney Coppolo asked when was the lot purchased. Attorney Campbell said that the property was purchased July 30, 2014 from Dickey property.

Mr. Perkins asked if cleanup began immediately from purchase. Mr. Mackey said that cleanup began prior to 2014 with the original owner Russell Dickey then went with Bill Dickey.

Attorney Campbell said that he believes that the remediation began in 2009 with William Dickey, Jr. He said that he was unprepared to assert former use of trucking company being gone as the non-conforming use has not gone away as it continues to burden the property today.

Mr. Coppolo asked if could speak to the stigma on the property. Attorney Campbell said that if a potential owner were looking at site would need to disclose remediation and also the property adjacent to the site is a garage with vehicles parked for repair etc. has direct impact on this lot.

Mr. Burgess asked if knew reasoning for 3 acre zoning. Attorney Campbell said he was unable to speculate reasoning for the Town of Derry's reasons for 3 acre zoning and

reviewed several towns zoning requirements for the Board. He reviewed the map submitted to the Board of lots in the area with possible ancillary uses.

Mr. Perkins asked where the property was mitigated if a realtor would need to disclose reasons to a potential owner. Attorney Campbell said that he would advise a realtor to disclose verses getting into a misrepresentation suit.

Mrs. Evans asked for a point of clarification as only aware of repair garage and asked if there are other commercial uses in the area. Attorney Campbell said that he was aware of conditions on other properties in the area and photos in package suggest other ancillary activity on some of the properties in the area. He said may not be business activity but may also not be what one would expect to see in 3 acre area.

Mrs. Evans asked where is proposed use permitted. Mr. Mackey said that the proposed use would fall under the definition of warehouse which are allowed in the Industrial zoning districts.

Mrs. Evans said that in reading an email from March 10, 2017 refer to submitting reports of traffic data and a report from Berkshire Hathaway but only see a tax map and traffic data submitted but no report regarding abutting property values. Attorney Campbell said that he did not have a report from Berkshire as unable to find significant area impacting market value of adjacent properties.

There was some discussion with regard to size of structures on the property.

Mr. Perkins said that there was 15 minutes left to the regular scheduled meeting and that the Board would not be able to hear the next case so it will need to be rescheduled to the next meeting.

Mr. Kelley said that if contamination of site was active that he believes there would be test wells onsite if found contaminated. Attorney Campbell said that is not necessarily true as may not be something water soluble. He said that he is familiar with GM sites and test wells are required if found something in the groundwater.

Mr. Perkins said known contaminates may or may not be a stigma but a realtor would need to disclose. Mr. Perkins said that he was closing this portion of the hearing and going to public input.

Favor

No one spoke in favor of the application.

Opposed

Brian Chirichiello said that Attorney Campbell had made a comment concerning the changes to the makeup of the Board members. He said that all the people here have

heard the case so no changes have been made. Mr. Chirichiello said that the 3 acre residential zoning was created at the same time the Industrial zoning changes were made.

Mr. Perkins said that Mrs. Evans had brought up where uses were allowed. Mr. Chirichiello said that not all the uses were brought up that were allowed in the LDR zone, Article IV, Section V left out uses of manufactured housing and he reviewed all the uses allowed in the zone for the record.

There was some discussion with regard to Section 165-48.

Mr. Perkins said that the format is to allow for rebuttal and the Board will need to take a motion to continue to the next meeting and begin at the deliberative session.

Mr. Burgess motioned to continue the case to allow for rebuttal and continue the meeting to the April 20, 2017 meeting.

Seconded by Mr. Kelley.

Vote: Unanimous

Mr. Burgess, Mr. Kelley, Mr. Coppolo, Mrs. Evans, Mr. Perkins

Rebuttal

Attorney Serge said that there are several points that need to be reviewed as follows:

- Screening of landscaping etc. is not going to help decrease impact to surrounding area.
- Lot size is not defined in size with uses. The uses in the area are not close to the repair shop.
- The accessory use is not an accessory use as there is a primary use of the property allowed.
- Substantial justice – public benefit far outweighs applicant's cleanup as it is what the buyer took on.
- State has no issue with property as stated by Mr. Kelley.
- No evidence presented of any environmental issues still present. No evidence of property with a stigma attached.
- Diminish of property values – feel a formal site walk would be valuable information for all factors. Still feel applicant fails on their presentation as no evidence shown that it would not diminish surrounding property values.
- 3 acre argument of too big to build a house on – there is other homes out there that are on 3 acre parcels. Applicant fails to present evidence from realtor stating unable to sell home if built on the lot.
- Statement of market would not support a home on the lot – again a statement made with no evidence provided to support.

Mr. Coppolo asked if it was correct in stating that the applicant has shown no burden of proof. Attorney Serge said that was correct.

Attorney Serge said that the applicant has a self-created hardship and that the Board needs to consider the big picture. He said that the former trucking use is gone, the property had a house on it and it was torn down by the applicant. The Town Council has spoken of schools and funding in the past through its established ordinance. Attorney Serge said that the Board needs to view the ordinance as a whole and not just for one parcel of land.

Mr. Coppolo said that both Attorneys' did a great job with their presentations.

Mr. Burgess motioned to continue the meeting until 10:20 pm.

Seconded by Mr. Kelley.

Vote: Unanimous

Mr. Burgess, Mr. Kelley, Mr. Coppolo, Mrs. Evans, Mr. Perkins

Attorney Campbell said that the owner, Robert Allen, was present this evening and wished to address the Board with regard to the value of the property.

Robert Allen, owner, said that there was a question with the value of the property. He said that he originally listed the property for \$450,000 and had received offers of \$310,000 and \$275,000 which were not close to what he has invested into the property. Mr. Allen said that he has worked with the State on remediation and has removed the house and debris from the property.

Mr. Perkins asked what the cost to remediate the property was. Mr. Allen said that he has spent over \$200,000 and still occurring costs.

Mr. Kelley asked if original intent was to build a house on the property. Mr. Allen said that his original intent was to straighten out the property and build a house and sell it which he has been unable to do. He said that he has had several offers on the property but none have come close to what he has currently invested to bring the property to what state it is at today.

Mr. Coppolo asked why he was involved in cleaning the property. Mr. Allen said that he had previously started to help clean up the property to help a friend out as he needed help. He said that it got to a point where he eventually purchased the property as it was too much for the former owner to do. Mr. Allen said that he recently found a plane the other day on the property. He said that he has done other projects in Derry which have been done neatly and done according to Town specifications.

Mr. Perkins said that he would entertain a motion to continue the case to the next meeting and to take up in the Board's deliberative session.

Mr. Burgess motioned to continue case 17-108 to the next meeting which would start with deliberative session.

Seconded by Mrs. Evans.

Vote: Unanimous.

Mr. Burgess, Mr. Kelley, Mr. Coppolo, Mrs. Evans, Mr. Perkins.

Mr. Perkins said that the next meeting would be April 20, 2017 and that the Board would be in Deliberative Session for case 17-108. He also stated that the Perfetto case would also be scheduled for the April 20, 2017 meeting due to the lateness of the meeting.

Approval of Minutes

Mr. Burgess motioned to approve the minutes of March 2, 2017 as amended.

Seconded by Mr. Coppolo.

Vote: Unanimous.

Mr. Burgess, Mr. Kelley, Mr. Coppolo, Mrs. Evans, Mr. Perkins.

Mrs. Evans motioned to approve the minutes of March 16, 2017 as amended.

Seconded by Mr. Burgess.

Vote: Unanimous.

Mr. Burgess, Mr. Kelley, Mr. Coppolo, Mrs. Evans, Mr. Perkins.

Other Business

Mr. Perkins said that there was a copy of Town & County if anyone was interested in reading.

Adjourn

Mr. Burgess motioned to adjourn.

Seconded by Mr. Kelley.

Vote: Unanimous.

Mr. Burgess, Mr. Kelley, Mr. Coppolo, Mrs. Evans, Mr. Perkins.

Adjourn at 10:13 pm

Minutes transcribed from tape:

Ginny Rioux

Recording Clerk

APPROVAL OF MINUTES April 20, 2017

Mr. Perkins motioned to approve the minutes April 6, 2017 as amended.

Seconded by Mr. Coppolo.

Vote: Unanimous.

Mr. Burgess, Mr. Kelley, Mr. Coppolo, Mrs. Evans, Mr. Perkins